No. 1037

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

STATE OF UTAH,

Respondent.

vs.

ALBERT EDMUND BARLOW,
Utah Case No. 6737

Appellant.

MORRIS QUINCY KUNZ,
Utah Case No. 6738

Appellant.

DAVID BRIGHAM DARGER,
Utah Case No. 6739

Appellant.

IANTHUS WINFORD BARLOW,
Utah Case No. 6740

Appellant.

DR. RULON CLARK ALLRED,
Utah Case No. 6741

Appellant.

OSWALD BRAINICH,
Utah Case No. 6742

Appellant.

(CONTINUED ON SECOND PAGE OF COVER)

APPELLANTS' BRIEF OPPOSING RESPONDENT'S BRIEF TO DISMISS

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(CONTINUED FROM FIRST PAGE OF COVER)

EDMUND F. BARLOW,
Utah Case No. 6743

Appellant.

ARNOLD BOSS,
Utah Case No. 6744

Appellant.

HEBER KIMBALL CLEVELAND,
Utah Case No. 6745

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LOUIS ALMA KELSCH,
Utah Case No. 6746

Appellant.

JOHN YATES BARLOW,
Utah Case No. 6747

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JOSEPH WHITE MUSSER,
Utah Case No. 6748

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JOSEPH LYMAN JESSUP,
Utah Case No. 6749

Appellant.

ALMA ADELBERT TIMPSON,
Utah Case No. 6750

Appellant.

CHARLES FREDERICK ZITTING,
Utah Case No. 6751

Appellant.

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APPELLANTS' BRIEF OPPOSING RESPONDENT'S BRIEF TO DISMISS

To the Honorables, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Respondent's brief in support of its motion to dismiss the appeal is as ill-contrived in its reasoning as it is maladroit in its caption—it is headed "The Supreme Court of The State of Utah", as if that august body were the arbiter of the motion to dismiss the appeal, a corrigendum, by the way, that inveigles us with new theories of appellate jurisprudence. We should not thus be severe if the brief did not contain downright mis-statements that cannot be condoned on the ground of inadvertency. The ill-advised respondent has actually stated in its brief, that "Each appellant stipulated that the testimony of the

state would show that he did the very thing prohibited by the statute in the words of the statute".

That statement is false; and in order to establish its falsity, it is necessary to quote here: (a) the Utah statute on Unlawful cohabitation; (b) the stipulation as to what the State's testimony would show in each case. This we now do:

> "103-51-2—Unlawful Cohabitation. All persons Except Defendant Must Testify. If any person cohabits with more than one person of the opposite sex, such person is guilty of a felony.
>
> Any person, except the defendant, may be compelled to testify in a prosecution for unlawful cohabitation; provided, however, that the evidence given in such prosecution shall not be used against him in any proceeding, civil or criminal, except for perjury in giving such testimony. A person so testifying shall not thereafter be liable to indictment, prosecution, or punishment for the offense concerning which such testimony was given."

It will be noted that the qualifying word "unlawful" is used twice in the statute, thus proving that the legislature recognized what the Supreme Court of the State of Utah and the respondent here failed to comprehend, namely, that there are two kinds of cohabitation, one lawful, one unlawful.

Now let us examine the stipulation entered into by each defendant (with names different only) to escertain if there be one word in it consistent with the words "unlawful cohabitation". Here it is:

> "That the said Albert Edmund Barlow on and between October 14, 1941, and the 1st day of March, A. D. 1944, at the County of Salt Lake, State of Utah, did cohabit with more than one person of the opposite

> sex, to-wit: With Amanda Kate Kilgrow, Vio Frazer, Marine Owen; and that said association was based on the belief of the said defendant and the women in the divinity of the Doctrine and the Covenants of the Church of Jesus Christ of Latter-day Saints (exclusive of the Manifesto). *No testimony was offered concerning sexual intercourse of the defendant with said women."* (Italics ours)

It was in the failure of the Court to give the defendants the presumption of innocence that they were denied due process.

To say that each defendant stipulated that he "did the very thing prohibited by the statute and in the words of the statute" is a falsehood unforgivable, on the ground of either artlessness or unskillfulness; in fact such a misstatement descends to that region of wilful misrepresentation condemned by every judicial tribunal. It was the very fact, that their "association" was not "unlawful", not characterized by "sexual intercourse", that caused the defendants to sign the stipulation.

The respondent in its *naivette* has taken the position that there can be no cohabitation without sexual concourse, yet in the same breath it denies the teachings of the Doctrine and Covenants and the United Order there enjoined. To the pure all things are pure; to the respondent an assemblage of persons for religious worship and daily life is *ipso facto* debauchery, despite the fact that the stipulation says "there was no evidence of sexual intercourse".

This paralogism with respect to the word "cohabit" vitiated the judgment of the trial court, the opinion of the Supreme Court of the State of Utah, and the respondent's brief herein considered. The United States clearly recognizes that there are two kinds of cohabitation and

heads its statute on the subject "*Unlawful* Cohabitation" (Crim. Code Sec. 314, 18 U.S.C.A. Sec. 514); furthermore, the proof must show that it is of the unlawful kind in order to uphold conviction. Thus:

> "living together as husband and wife. *Ex parte Snow*, 7 S. Ct. 556, 120 U. S. 274, 30 L. Ed. 658.
>
> "holding out two women to the world as his wives". *Cannon v. U.S.*, 6 S. Ct. 278, 116 U.S. 55, 29 L. Ed. 561.

We do not find a single case, state or federal, in which the defendant was convicted without proof sufficient to show that the cohabitation was of the unlawful kind. It should be remembered that the stipulation herein is not a stipulation of facts but a stipulation concerning the state's testimony. The defendants denied it by pleas of "not guilty" and thus we are constrained to determine the sufficiency of the state's case. The court had no right to assume anything beyond the bare words of the state's testimony, and when there was nothing whatever to show that the cohabitation was of the unlawful type, it was bound under the due process clause to presume an innocent intentment. This it did not do: it found the defendants guilty and sentenced them to an aggregate of seventy-five years imprisonment! The Supreme Court of Utah adopted the same error, and that is why the defendants are seeking due process on further appeal.

The misconceptions of the respondent in its brief are so erroneous that we list them.

1.

It proceeds on the theory that the stipulated testimony in these cases shows the same facts as those established in Reynolds v. U.S. 98 U.S. 145, 25 L. Ed. 244, despite that bigamy, not unlawful cohabitation, was there involved.

2.

It then pursues this misconception further and assumes that the stipulation herein embraces all the facts shown in Davis v. Beason, 133 U.S. 333.

3.

It argues in effect that "polygamy" is shown by the stipulation whereas unlawful cohabitation is the charge and polygamy has nothing to do with it. Polygamy is a second marriage while a valid first marriage exists.

4.

The respondent ignores the full religious teachings on marriage and moralities contained in the Doctrine and Covenants mentioned in the stipulation. In that book it says (42:22):

> "Thou shalt love thy wife with all thy heart, and shalt cleave unto her and none else".

and (49:16):

> "Wherefore, it is lawful he should have one wife, and they twain shall be one flesh".

Yet respondent assumes that the reference to the Doctrine and Covenants in the stipulation is necessarily to polygamy. Again the guilty rather than innocent inference is indulged, and the defendants denied due process.

5.

Thus having assumed that all of the facts essential to a charge of polygamy are established here, despite the fact that polygamy is not involved, the respondent then says that the questions here involved are all formally passed on, and cites a number of inapplicable cases. Thus it de-

liberately cites Murphy v. Ramsey, 114 U.S. 15, and Late Corporation of the Church v. U. S., 136 U.S. 1, as if those cases on polygamy were applicable here. Following this misconception, the respondent attempts to mislead this Court into the belief that it has already sufficiently passed on the Utah unlawful cohabitation statute, the meaning of the word "cohabit" and all other pertinent matters. This subterfuge cannot be overlooked.

Even as late as 1940 the Supreme Court of Utah said on the very unlawful cohabitation statute herein considered (State v. Jessup, 98 Utah 482, 100 P 2d 969)

> "The definition of cohabitation given by our statute is so general that to limit the information to it, word for word, states no more than a class of crimes."
>
> "*Unlawful cohabitation is proved by facts showing a course of conduct that to all outward appearances convinces one that the parties are living together as man and wives.*" (Italics ours)

Here there was complete absence of such vital proof. The respondent here argues as though the defendants pleaded guilty. They did not plead guilty—they pleaded not guilty and the testimony of the state did not make a case. It could never have been held to be a case if the defendants had been given the presumption of innocence guaranteed by the Fourteenth Amendment.

The defendants contend that the unlawful cohabitation statute cannot be given the same construction as the polygamy statute; this for the pertinent reason that the alleged immorality of polygamy is not involved in the unlawful cohabitation statute. How may one say that because polygamy is not within the protection of the First Amendment, unlawful cohabitation, which can be established without any proof of multiple marriage, is likewise

beyond the protection of that amendment? This point has never been decided by the Supreme Court of the United States, a major reason why these cases present a substantial and vital question. Where in these cases is there any evidence of holding out as wives by any defendant as to any women? Here appears nothing more than a legal abstraction, a condition without implication of either immorality or plurality of wives.

All of the cases cited by respondent, including the Reynolds case, are pure dicta as far as a finding of immorality is concerned, and the Reynolds case involved bigamy not unlawful cohabitation. The discussion there of the morals of polygamy was not essential to the decision; it is pure *obiter dicta.*

The Supreme Court of the United States has never as far as we know passed on the legality of the unlawful cohabitation statute as violative of the First Amendment. The appeal in Cannon v. U.S., 116 U.S. 55, 6 S. Ct. 278, 29 L. Ed. 561, was dismissed because no federal question was involved, and Snow v. U. S. 6 S. Ct. 1059, 118 U.S. 346, 30 L. Ed. 207 was dismissed for the same reason.

So here for the first time a substantial and important question is raised not only concerning the denial of due process to the defendants but also the withholding from them of the protection of the First Amendment to the Constitution of the United States.

It is only reasonable and just, that there can be no violation of any unlawful cohabitation statute in any state unless some immoral condition or relationship be shown. To say otherwise were to deny the right of assemblage. The matter of polygamy and polygamous living has been held to supply that necessary element in the proof; but poly-

gamy is here not either charged in the complaint or mentioned in the testimony. It is held by the Courts, that in unlawful cohabitation cases there need be no proof of marriage; but there must be a holding out as man and wives to supply that necessary element of immorality. The word "wife" or "wives" is not in the testimony here; in fact immorality in any form is not in this record. The First Amendment must necessarily protect where facts are not shown establishing immorality. How broad is the discretion of the Supreme Court of the United States where it feels that any Constitutional right is being denied is shown in Hague v. C.I. O., 307 U.S. 496, 59 S. Ct. 945 (960) where it said:

> "Every question arising under the Constitution may, if properly raised in a State court, come ultimately to this Court for decision."

And again:

> ". . . . . Equally obvious is it that a *state may not unduly suppress free communication of views*, religious or other, under the guise of conserving desirable conditions. *Here we have* a situation analogous to *a conviction under a statute sweeping in a great variety of conduct under a general and indefinite* characterization, and *leaving* to the executive and judicial branches *too wide a discretion in its application.*"
>
> *Cantwell vs. State of Connecticut*, 310 U. S. 296, 60 S. Ct. 900 (903) (Italics inserted)

Upon the application of the 5th Amendment against a State that in charging a defendant failed to state the "nature and cause of the accusation", see:—

> "The scope and operation of the Fourteenth Amendment have been fruitful sources of controversy in our constitutional history. However, in view of its historical setting and the wrongs which called it into being, the due process provision of the Fourteenth

Amendment . . . just as that in the Fifth . . . has led few to doubt that it was intended to guarantee procedural standards adequate and appropriate, then and thereafter, to protect, at all times, people charged with or suspected of crime by those holding positions of power and authority. Tyrannical governments had immemorially utilized dictatorial criminal procedure and punishment to make scapegoats of the weak, or of helpless political, religious, or racial minorities and those who differed, who would not conform and who resisted tyranny. The instruments of such governments were, in the main, two: Conduct innocent when engaged in, was subsequently made by fiat criminally punishable without legislation. And a liberty loving people won the principle that criminal punishments could not be inflicted save that which proper legislative action had already "by the law of the land" forbidden when done. But even more was needed. From the popular hatred and abhorence of illegal confinement, torture and extortion of confessions of violations of the "law of the land" evolved the fundamental idea that no man's life, liberty or property be forfeited as criminal punishment for violation of that law *until there had been a charge fairly made* and fairly tried in a public tribunal free of passion, prejudice, excitement and tyrannical power. Thus, an assurance against ancient evils, our country, in order to preserve "the blessings of liberty", wrote into its basic law the requirement, among others, that *the forfeiture of the lives, liberty and property of people accused of crime can only follow if procedural safeguards of due process have been obeyed.*

The determination to preserve an accused rights to *procedural due process* sprang in large part from knowledge of the historical truth that the rights and liberties of people accused of crime could not be safely entrusted to secret inquisitorial *processes.* . . . . . And they who have suffered most from secret and

dictatorial proceedings have always been the poor, the numerically weak, the friendless, and the powerless.

(4) *This requirement . . . of conforming to fundamental standards of procedure in criminal trials . . .* was made *operative* against the states by the Fourteenth Amendment. . . ."

Chambers v. Florida, 309 U.S. 227, 60 S. Ct. 472, at pp. 476-478. (Italics inserted)

Here the 5th Amendment, by indirection, is brought into the 14th.

If it shall be contended that the Utah statute against unlawful cohabitation may be enforced in the absence of the proof of any immorality, then that statute certainly is void as being in direct violation of the First Amendment guaranteeing freedom of assembly; and the general welfare declaration of the Constitution,:—"establish justice, —and secure the Blessings of Liberty to ourselves and our Posterity".

If that be the contention of the State, it is advocating the worst possible form of tyranny and injustice.

This Honorable Court, in the Cannon case, supra, has very carefully said that such cannot be with respect to the Federal statute prohibiting unlawful cohabitation in the Territory of Utah,;—

"What, then, was the object of Congress in enacting this statute? It was, judging from the whole act, intended to be an aid in breaking up polygamy *and the pretenses thereof.* . . . We find nothing whatever in the language or context to lead us to believe that Congress meant to apply the statute to lewd and lascivious cohabitation."

Now, then: The "pretenses" of polygamy consist in the holding out of women as wives, the apparent polygamous relationship, in the absence of which *in the proof*, no purpose is made out for the Act. This is the import and clear declaration of every case we have been able to find directly bearing on the matter.

Some form of illegality, besides a mere legislative declaration of a ban on a living status, must appear, in the pleading and in the proof, else the statute is void as beyond the police power of either State or Nation.

This Court has said, as above, that at least two forms of such illegality are those things at which the preceding Federal statute was directed, viz: either polygamy, or "the pretenses of" polygamy, and has classified polygamy as immoral, so giving constitutionality to the former Act. Without that clause "and the pretenses thereof" the Federal Act would have fallen.

Even considering the dicta in the cases, we can find no support for this statute. There being nothing in the record here, either in the information or the stipulation showing any "pretense" of a polygamous relationship; there being a like dearth of any pleading or showing of a polygamous relationship itself, this series of convictions must fall.

Unless these cases be heard and reversed, an instrumentality of the most obnoxious oppression will have been given sanction, forming a basis for other and like destructions of all of the freedoms assured under the 1st and 14th Amendments.

The cases cited by the State cannot show any reason why these cases should not be heard. They indicate that they must be examined, as involving the necessary de-

termination of rights never before presented to this Court.

Let us assume, for the purposes of this following argument only, that polygamy is an adjudicated immorality, and in that light examine the cohabitation cases:

It inescapably follows that it is the immorality of polygamy which takes that practice out of the protection of the First Amendment.

In the absence of any pleading or proof showing that a cohabitation was, in fact, tinged with the polygamous "pretense" or that of apparent husband and wives relationship, application to such charges must have no force.

So, for that exception to the protection of the First Amendment to be urged, some showing of either: polygamy actually practiced, or some "pretense" of polygamy, one or the other, must appear in both the charge and the proof—in the evidence. Neither is present. No proof of any immorality here appears in the record in its entirety, or in any particular.

A cohabitation practiced under a sincere religious belief, with no showing of any *mala fides*, has the benefit of the complete protection of both the First and the Fourteenth Amendments. Such is the case here.

Such is here presented for the first time to this Honorable Court. No prior decisions have so much as hinted at any determination of this matter. This is a substantial and fundamental right of every citizen. The rights of every citizen are inescapably affected by the decision here.

That we have not misstated the law as declared by the courts let us cite the following:

> "It was such offense that Sec. 3 of the Act was intended to reach, *the exhibition of ALL the indicia* of

marriage; *a household and a family, twice repeated.*"

Cannon v. United States. (Supra) 116 U.S. 75.

"It is assigned as error that the court told the jury that "the law aims at the wrongful example of an apparent as well as an actual polygamous relation, without reference to what actually occurs with his plural or polygamous wives." . . . A man cannot *DISPLAY all the indicia of a married life,* and yet plead its non existence successfully."

United States v. Peay, 5 Utah 263 342 14 Pac. at p. 345. (Italics inserted)

The court in the Peay case, at pp. 343-345, recites the specific evidence upon which it thereafter therein holds the same to be sufficient to sustain the verdict of guilty.

Further, the court says:

"The following extract from the charge of the court is assigned as error: "But, *when you come to the proof of cohabitation with the illegal wife,* it requires proof of the fact. *The presumption would be against it,* to commence with. The presumptions of the law are in favor of innocence, and *until some evidence has been given tending to show these acts* of cohabitation on his part, the presumption would be that he didn't do that; but where it is shown these acts of cohabitation have taken place with the plural wives, if shown beyond a reasonable doubt, then it is a cohabitation within the meaning of the law." (Italics ours)

That instruction is there upheld as a proper statement of the law, and as not tending to imply the guilt of the defendant or to alter the rule of "presumption of innocence".

See *Peay case,* supra, 14 P. at p. 345-6.

"The term 'cohabit', as found in the criminal codes of many of the states, is coupled with and qualified

by the adverbs 'lewdly', 'lasciviously', 'adulterously', or some other equivalent expression. No such word or expression is found in the section under consideration, or in the act of which it is a part. As defined by lexicographers, 'cohabit' means to dwell with or reside together. *It may mean* residing in the same country, city, or neighborhood, or in the same family, or the dwelling together in lawful wedlock. This would be lawful cohabitation. *Or it may mean* the dwelling of a man and woman together ostensibly and apparently in wedlock, when, in fact or in law, no marriage exists; and without proof of adultery or fornication, this would be unlawful cohabitation. *Or it may mean* the living together of a man and woman, without lawful marriage, in the practice of fornication or adultery. . . . The ideas which accompany the use of the word determine its import. . . . It is a word of flexible signification."

"The end of the law was the protection of the monogamous marriage; and the suppression of polygamy and unlawful cohabitation were but means to that end. . . . Congress therefore forbade plural marriage *in appearance* only, as well as in form, and by the example of punishment it doubtless intended to erradicate the example of *apparent plural marriages*, as well as the plural marriages in form."

"The defendant also insists that the evidence before the jury did not prove him guilty. This raises a question of fact: to determine which it is necessary to examine the evidence."

"*The offence of the defendant consisted in dwelling with* the women in the habit and repute of marriage, holding that relationship out to the world *by his language and conduct*, or by expressions and conduct, for which he was responsible. . . . *The question is, what relationship existed between the defendant* and these women? Was the defendant there as a guest?

> As a border? Was he the proprietor of the house, and the women in his employ as servants,—chambermaids or cooks? Were they his sisters? Was one of them his mother? Or were they there as his wives?"
>
> *United States v. Musser*, 4 Utah 153, 7 Pac. 389.

The court then concludes that the evidence: the showing of marriages; the children of each woman attending the same school and giving the surnames, respectively, of the defendant, with different mothers; the payment by one of the "wives" of the charges of the school-master; the residence of the same school-master in the home of the defendant, and his testimony as to the family relationships there, etc., etc., *was a sufficient showing of the necessary matters of fact*, from which *the answer to the question of fact* enumerated might properly be made.

Despite the allusion of the respondent the practice of polygamy is not referred to in either the information or the stipulation. It is true, that the lower courts treated these cases as if that fact or its "pretense" had been shown. Such treatment of these charges and evidence cannot be sustained on any tenable hypothesis.

Unlawful cohabitation cannot be polygamy. It has been declared by every decision not to be polygamy in fact, but the "pretense" of the real thing. Those cases all assert that the *semblance*, the *holding out* to the world, the *apparent* state of plural marriage must be established by evidence, not by inference, to sustain conviction on charges of this nature. There is no dissent from all these interpretations of the Utah Statute. Polygamy and unlawful cohabitation under the Utah statute cannot be regarded as synonymous terms when all the cases differentiate them. Cohabitation is unlawful only when it has the pretense of polygamy; and to say that no facts need be shown to ex-

plain cohabitation is to convict without testimony and deny due process. The protection of the First Amendment when applied to such facts has never before been presented to this Honorable Court.

Even the Justice who wrote the decision in this case below has since that time apparently recognized that reading into the word "cohabit" an unlawful meaning not there is a malapropism, for in an opinion rendered in M. S. Tel. & Tel. Co. v. P. Util. Com., 155 P. 2nd 184 (Jan. 9, 1945), he said:

> "We therefore address ourselves to its meaning, keeping in mind one of the cardinal rules of statutory construction, viz., that the interpretation must be based on the language used, and that the Court has no power to re-write a statute to make it conform to an intention not expressed."

The Courts below have ignored the fact that those rights here asserted by appellants under the Treaty of Guadalupe Hidalgo have likewise never before been presented to or passed upon by this Honorable Court.

This matter seems to have received, as our soldiers say, "the brush-off". We believe such to be serious and ill-advised.

That Treaty provides, inter alia, as follows:

> "Art. IX. The Mexicans who, in the territories aforesaid, shall not preserve the character of citizens of the Mexican Republic, comformably with what is stipulated in the preceding article,shall be incorporated into the Union of the United States and be admitted, at the proper time, (to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States according to the principles of the Constitution; *and in the meantime shall be maintained and protected in the free*

enjoyment of their liberty and property, and secured in the free exercise of their religion without restriction."

The Protocol of May 6th, 1848, between the Commissioners of the United States and the Minister of Foreign Affairs of the Republic of Mexico, at Queretaro, provides as follows:

"1st. *The American Government* by suppressing the IXth article of the treaty of Guadalupe Hidalgo and substituting the III article of the Treaty of Louisiana, *did not intend to diminish in any way* what was agreed upon by the aforesaid article IXth *in favor of the inhabitants* of the territories ceded by Mexico. Its understanding is *that all of that agreement is contained* in the 3d article of the Treaty of Louisiana. In consequence *all the privileges and guarantees, civil, political and religious,* which would have been possessed by the inhabitants of the ceded territories, if the IXth article of the treaty had been retained, *will be enjoyed by them, without any difference,* under the article which has been substituted."

And the Gadsen Treaty of 1854, recited:

"Art. V. All the provisions of the Eighth and *Ninth,* Sixteenth and Seventeenth Articles of the Treaty of Guadalupe Hidalgo shall apply to the Territory ceded by the Mexican Republic in the First Article of the Present Treaty, *and all the rights of Persons and property both civil and ecclesiastical within the same,* as fully and effectively as if the said Article were herein again recited and set forth."

The matter of *property rights* under these treaties has frequently been before the courts of the United States, notably in the following cases:

Ely v. U.S., 171 U.S. 220.
Cessna v. U.S., (1898) 169 U.S. 165.

Tripp v. Spring, (1878) 5 Sawy. (U.S.) 209, holding:

"The obligation which the United States assumed by the Treaty with Mexico was *to protect all rights of property acquired under the laws of that country.* * * *"

San Francisco v. LeRoy (1891) 138 U.S. 671.
Townsend v. Greeley, 5 Wall. (U.S.) 326.
Astriasaran v. Santa Rita Land, etc., Co. (1893), 148 U.S. 80.

"For it is equally well settled that when the *United States acquired California from Mexico by the treaty of Guadalupe Hidalgo*—they were bound under the eighth article of that treaty *to protect all rights of property in that territory emanating from the Mexican government PREVIOUS TO THE TREATY.*"

Knight v. U.S. Land Assoc. (1891), 142 U.S. 162.

See also:

U.S. v. Chaves, 159 U.S. 452.

We have not found a single case in which the religious rights guaranteed by this Treaty have been passed upon.

Clearly this case supports the propositions:

(a) That the immorality attendant upon the actual practice of polygamy must be shown as apparent, and as held out to the world by acts, doings, etc., of the defendant and for which he was responsible, before the unlawful cohabitation statute of Territorial Utah could be applied, where polygamy was being sought to be suppressed.

(b) That, in the absence of evidence received on the trial before the jury showing the apparent marital relationship *as a matter of fact proved beyond reasonable doubt* by the evidence, the presumption of innocence must prevail.

We cite no more such cases, as we say that no case can be cited holding contrary to those now quoted from above.

No matter which horn of this matter now before the Court be taken hold of, the result is inescapably the same: The cases must be here reviewed. The convictions must be reversed.

Respectfully submitted,

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